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No. _____

In the Supreme Court of the United States

ANTON TITTJUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court has original subject-matter jurisdiction to examine and set aside the visa-eligibility decision of an American consular officer as its basis for revoking citizenship in a denaturalization proceeding, where no statute provides for visa-reviewing authority.

PARTIES TO THE PROCEEDING

Petitioner

Anton Tittjung is an individual and has no corporate affiliations.

Respondent

The Respondent is The United States of America.

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The Petitioner, Anton Tittjung, respectfully prays that this Court issue a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. A, p. 1a) is reported at *United States of America v. Anton Tittjung,* 235 F.3d 330 (7th Cir. 2000), and the unreported district court opinion and order of April 27, 2000 denying petitioner's motion to dismiss the Complaint under Fed.R.Civ.P. 60(b)(4) is reprinted (App. B, p. 24a). The district court opinion in the original action is reported at 753 F.Supp. 251 (1990) (App. C, p. 33a), aff'd. without opinion, 948 F.2d 1292 (7th Cir. 1991), cert. den. 505 U.S. 1222 (1992).

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 15, 2000, and the Court of Appeals entered its order denying a timely petition for rehearing and petition for rehearing en banc on February 23, 2001 (App. D, p. 49a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the subject-matter jurisdiction of a federal court to redetermine a citizen's eligibility for an immigrant visa in a citizenship-revocation proceeding under 8 U.S.C. §1451(a).

The pertinent statutory requirements for citizenship and denaturalization under the Immigration and Nationality Act of 1952 (1952 Act), 8 U.S.C, §1101 et seq., are as follows:

§1427. Requirements of Naturalization

(a) Residence

No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully admitted* for permanent residence, within the United States for at least five years . . . (emphasis added)

§1429. Prerequisite to naturalization: burden of proof

Except as otherwise provided in this title, no person shall be naturalized unless he has been *lawfully admitted* to the United States for permanent residence *in accordance with all applicable provisions of this Act.* (emphasis added)

§1451. Revocation of naturalization

(a) Concealment of material evidence; refusal to testify

It shall be the duty of the United States attorney for the respective districts upon affidavit showing good cause therefore, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking

> and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: . . .

See full text of 8 U.S.C. §1101(a)(20) and 8 C.F.R., Part 1, §1.1(p) at App. E, p. 51a.

STATEMENT OF THE CASE

Anton Tittjung received an immigrant visa, was inspected, and lawfully admitted to this country by the Immigration and Naturalization Service (INS) on May 24, 1952, and was naturalized pursuant to 8 U.S.C. §1427(a) by order of the district court in Milwaukee on August 31, 1974. (Certificate of Naturalization, App. F, p. 52a)

On September 1, 1989, the Government, represented by the Office of Special Investigations (OSI), Department of Justice, filed a nine count civil complaint charging that Tittjung was not visa eligible and therefore not "lawfully admitted" when he entered this country in 1952 under the Displaced Persons Act. On that basis it demanded revocation of the order admitting Anton Tittjung to citizenship pursuant to 8 U.S.C. §1451(a) on the ground that he was not "lawfully admitted" - a citizenship prerequisite under §1427 - and therefore his naturalization was illegally procured.

A. Proceedings Below

On December 14, 1990, after a trial, the district court found that Tittjung was ineligible for a visa "as a matter of law" on count one and revoked citizenship. (App. C, p. 47a) The remaining counts were dismissed. The order was affirmed on appeal and certiorari was denied. Subsequently Tittjung was ordered deported, and now all appeals have been exhausted.

On January 10, 2000, the petitioner filed a Motion to Dismiss the Complaint, attacking jurisdiction under Fed.R.Civ.P. 60(b)(4), which was denied on April 27, 2000. The appeal was dismissed and the petition for rehearing was denied.

B. The District Court's Denaturalization Method

The district court found that the defendant's visa ineligibility "illegally procured" citizenship. Specifically, it found that his military service during the war as a private in the Waffen-SS stationed as a perimeter sentry outside a German concentration camp made him ineligible to receive a visa under the Displaced Persons Act (DPA) of 1948 (62 Stat. 1009), as amended (64 Stat. 219); it concluded that "he failed to obtain a valid visa, which is a statutory prerequisite to naturalization. . . . [c]onsequently Tittjung's subsequent naturalization was illegally procured," and revoked citizenship. (citations omitted) (App. C, p. 47a)

The district court's syllogism assumes that an immigrant visa is a prerequisite to naturalization and that it has jurisdiction to examine and redetermine Tittjung's former visa eligibility under 8 U.S.C. §1451(a). The result of this method: the district court examined and set aside the visa-

eligibility decision of the American consular officer in Salzburg, Austria, finding that Tittjung was "ineligible for a visa as a matter of law" when he entered in 1952. (App. C, p. 47a). This was the trial court's method of denaturalization. The district court's original opinion specifically omitted any finding that he made a misrepresentation to obtain the visa. (App. C, p. 47a) Further, it did not find that he was not "lawfully admitted" when he entered or when he was naturalized.

This was the only method used in this case to revoke the defendant's citizenship order.[1]

C. The Effect of the District Court's Denaturalization Method

The denaturalization procedure here was a trial *de novo* on the sufficiency of the evidence that established the petitioner's visa eligibility in 1952 under the DPA.[2]

Section 1451(a), the denaturalization statute, provides for revocation of the "*order* admitting such person to citizenship . . . on the ground that such *order* . . . [was] illegally procured . . ." (emphasis added); visa and immigration review are not mentioned. Sustaining the visa-ineligibility method means that without congressional authority an Article III court can substitute its judgment for

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[1]The district court found only on one count of the Complaint. (App. C, p. 47a)

[2]Note that the 1974 court order of citizenship makes no reference to immigration; rather, it "*found*" that Tittjung had "*complied*" with "*naturalization laws*." (See Certificate of Naturalization, App. F, p. 52a)

that of a consular officer and denaturalize a citizen based on his lack of qualifications for an immigrant visa.

Tittjung's position is that §1451(a) does not provide subject-matter jurisdiction to review visa eligibility in a denaturalization proceeding; moreover, the subject of visa examination in a federal court is completely devoid of merit.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT, OTHER CIRCUITS, AND STATUTORY LAW.

The Court of Appeals' holding that it has visa-reviewing jurisdiction cannot be reconciled with decisions of other circuits, Supreme Court precedent, or statutory law.

Tittjung states:

> We do not believe . . . that a certificate of naturalization acts as a *tabla rosa* [sic], thereby precluding us from examining the validity of the visa upon which the certificate was granted. (App. A, p. 9a)

The appellate court assumes that a naturalization certificate is based on the visa and then holds that it can examine the visa's validity.

> . . . we now state unequivocally that Article III courts have jurisdiction to vacate an order of naturalization when that order is based on an illegally obtained visa (App. A, p. 12a)

The fundamental issue is whether the denaturalization statute, §1451(a), provides federal jurisdiction to re-examine the evidence upon which Tittjung's *visa* was issued, determine that it was "illegally obtained," and on that basis revoke citizenship.

The history of judicial incursion into immigration matters demonstrates that in each instance for over one hundred years this Court has struck down every attempt to have federal courts redetermine immigration decisions. However, in a citizenship revocation proceeding, the Seventh Circuit justifies this exception by stating:

> Were we to hold that separation of powers bars examination of visa eligibility by Article III courts, we would be substantially limiting the impact of 8 U.S.C. §1451. (App. A, p. 14a)

The circuit's position is that its determination of what impact §1451 must have is paramount to the separation of powers and the mandate of Congress.[3] *Tittjung* assumes that the power to denaturalize must carry with it the inherent power to reexamine and set aside the consular officer's decision to issue a visa in 1952.

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[3]The court of appeals addresses the Separation of Powers issue. (App. A, p. 12a)

The statutory scheme makes clear that, in this regard, Congress has authorized the consular officer with exclusive jurisdiction "relating to the granting or refusal of visas." See 8 U.S.C. §1104(a)(1).[4] Further, giving deference to Justice Department regulations, an immigrant's lawfully-admitted status is changed "upon entry of a final administrative order of exclusion or deportation."[5] No law provides for changing or reviewing immigrant status after the citizenship order is entered.

While discussion of visa and immigration jurisdiction in a federal court must end in the absence of an enabling statute, further support for petitioner's position lies in the clear statutory language that "lawfully admitted," as stated in §1427, must be determined for citizenship qualification purposes under the 1952 Act, the law in place when Tittjung was naturalized. See 8 U.S.C. §1429.

A. Conflict with Decisions of Other Circuits

Consideration is necessary because the Seventh Circuit's decision in *Tittjung* conflicts with the decisions of other circuits. *Tittjung* affirms that ". . . the district court in 1990 determined Tittjung to be visa ineligible and therefore revoked his citizenship . . ." (App. A, p. 9a) Four other circuits have reviewed the issue of the visa re-examination by a federal court, and in their analyses each has made clear that the authority to grant and refuse visas is exclusive to the

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[4]See also §2(a) of the Immigration Act of 1924, 43 Stat. 153, in effect when Tittjung entered.

[5]See 8 C.F.R., Part 1, §1.1(p.); (App. E, p. 51a).

consular officer.[6] In *City of New York v. Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989), the court made clear that

> The authority to issue a visa belongs solely to the consular officers of the United States. See 8 U.S.C. §§1101(a)(9) & (16), 1104(a)(1), 1201(a). This circuit has recognized, as has every other circuit to consider the issue, that the courts are without authority to displace the consular function in the issuance of visas.[7]

See also *London v. Phelps*, 22 F.2d 288, 290 (2nd Cir. 1927), *cert. denied*, 276 U.S. 630 (1928), and *Burrafato v. United States Department of State*, 523 F.2d 554, 556 (2nd Cir. 1975), *cert. denied,* 424 U.S. 910 (1976).

In *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), denial of a visitor's visa by a consular officer in Manila "was not subject to any review by a federal court." (pp. 1212-13; other citations omitted)

In *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986), the U.S. Consul in Hong Kong denied an L visa to plaintiff's employee. The court made clear that the doctrine of non-reviewability of a consul's decision to grant

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[6]8 U.S.C. §1104(a)(1) charges the Secretary of State with the administration and enforcement of the Act "except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."

[7]In addition, 8 U.S.C. §1201(g) states that no visa *shall* be issued *if it appears to the consular officer, from the statements in the application or papers submitted therewith* that the alien is ineligible to receive a visa under law. Similar text is noted in the repealed Immigration Act of 1924, §2(f), 43 Stat. 154.

or deny a visa stems from the Supreme Court's confirming that "the legislative power of Congress over the admission of aliens is virtually complete." (p. 970) (case citations omitted) In *Ventura-Escamilla v. INS*, 647 F.2d 28, 32 (9th Cir. 1981), the court stated that it had no "power to substitute its judgment for that of Consul . . . or the issue of whether a visa should be granted or denied."

In *Tittjung*, however, the decision of the U.S. Consul in Salzburg to issue a visa was reviewed and set aside by the district court, which "found that Tittjung was ineligible for a visa as a matter of law." (App. C, p. 47a) The Seventh Circuit justifies visa-reviewing jurisdiction, stating that:

> . . . Article III courts do have the power, in the course of determining whether the statutory prerequisites for naturalization have been met, to examine visa eligibility." (App. A, p. 14a)

The decisions of four other circuits conflict with this position.

B. The Decision Below Disregarded Case Law of This Court.

While this Court has not spoken on the specific issue of judicial *visa*-review, the following decisions of this Court show that Congress has never given Article III courts original jurisdiction to review, set aside, or overrule the Executive in *immigration* matters.

In *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), this Court made clear that congressional power over aliens is complete and that the "scope of judicial inquiry into immigration legislation" is limited, and "that 'over no conceivable subject

is the legislative power of Congress more complete than it is over' the admission of aliens." (citation omitted)[8]

In *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), this Court reversed a circuit's finding that improperly determined what constituted "extreme hardship" in a deportation proceeding, a definition which in the first instance is committed to the Attorney General.

Tittjung states the contrary:

> . . . we have never wavered from our understanding that the basis for the determination that Tittjung was *removable* was that he was never *lawfully admitted* to this country, a required prerequisite to naturalization under 8 U.S.C. §1427. (emphasis added) (App. A, 17a)

Determination of "lawfully admitted" for immigration purposes is *exclusive* to the Attorney General under 8 U.S.C. §1103. Congress has never given Article III courts original jurisdiction to change lawfully admitted status or determine that an immigrant was "*removable.*"[9]

This Court has stated on numerous occasions that any jurisdiction to review immigration status must be *expressly* given by Congress. In *Fong Yue Ting v. United States*, 149

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[8]*Tittjung* finds visa and immigration jurisdiction also in the "Cases" and "Controversies" language of Article III, Sec. 2 of the Constitution. (App. A, p. 13a)

[9]"Lawfully admitted" by definition is "*status not having changed*" granted by the Attorney General (see 8 U.S.C. §1101[a][20]; see also 8 C.F.R. §1.1[p]), and it is revoked "upon entry of a final administrative order of exclusion or deportation." (App. E, p. 51a)

U.S. 698, 713 (1893), *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), *Wong Wing v. United States*, 163 U.S. 228, 233 (1896), *Japanese Immigrant Case*, 189 U.S. 86, 99 (1903), *Knauff v. Shaughnessy*, 521 U.S. 537, 542 (1949), and *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) this Court has consistently held that immigration jurisdiction falls entirely within the power of Congress and is exercised exclusively through executive officers and that no other tribunal, unless expressly authorized by Congress, may reexamine the evidence on which the executive officer acted nor controvert its sufficiency.[10]

The decision in *Tittjung* cannot be reconciled with the cited cases and §1451.

C. This Court's Decision in *Fedorenko* is Contrary to the Established Case Law of this Court and Should Be Reversed.

Certiorari was granted in *Fedorenko v. United States*, 449 U.S. 490 (1981), to determine "whether petitioner's failure to disclose [his camp service], in his application for a visa rendered his citizenship revocable as 'illegally procured' or procured by willful misrepresentation of material fact . . ." (p. 493) Without analysis, this Court permitted this visa-redetermination method of applying the abrogated Displaced Persons Act for purposes of denaturalization in *Fedorenko*. This was the only time this Court permitted a review on the merits of a consular decision or an INS decision to admit an immigrant.

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[10]With respect to immigrants, 8 U.S.C. §1103 provides that "determination and ruling by the Attorney General with respect to *all* questions of law shall be controlling." (emphasis added)

Fedorenko's analysis proceeds in three basic steps: 1) it noted that the petitioner admittedly lied on the visa application, thereby falling within the misrepresentation clause of the DPA (p. 500 and 507); 2) it reviewed his wartime service to determine if the misrepresentation was material (pp. 507-8, and 513-4); and 3) it determined that the material misrepresentation invalidated his visa under §13(a) of the 1924 Act.

A closer look at *Fedorenko* shows that, upon finding the misrepresentation (Step 1), this Court then examined Fedorenko's visa entry under the DPA, reviewing the trial evidence, noting that there must be "strict compliance with the statutory conditions precedent to naturalization" as set by Congress.[11] (p. 506) *Fedorenko* then determined that *it* must decide the proper materiality standard for false statements at *immigration* (p. 508), stating that failure to disclose true facts at the visa stage would have made Fedorenko "ineligible for a visa under the DPA" (p. 509). Next, it determined that his camp service, whether involuntary or not, made him ineligible for a visa (p. 512), noting that all who assisted in persecution of civilians were ineligible for visas (p. 512), and concluding "that petitioner was, as a matter of law, ineligible for a visa under the DPA [making] the resolution of the case fairly straightforward."(p. 514) Step 2 finds camp service material.

Fedorenko then proceeds to the last phase of its analysis, Step 3: "§§1427 and 1429 required an applicant for citizenship to be lawfully admitted for permanent residence"

[11]Here the court presumes that a statutory pre-condition for naturalization is visa eligibility.

(p. 514),[12] and lawful admission for permanent residence "required that the individual possess a valid unexpired immigrant visa" (p. 515), and that a visa obtained through a material misrepresentation was not valid" (p. 515). This Court concluded that Fedorenko did not possess a valid, unexpired immigration visa when he entered, and therefore his visa was invalid under §13(a) of the Immigration Act of 1924 (43 Stat. 153) (p. 515).[13]

The result of an invalid visa meant that Fedorenko was not lawfully admitted; and under §1427, he failed to satisfy the statutory requirement for citizenship; therefore his "citizenship must be revoked because it was illegally procured." (p. 515) The entire *Fedorenko* analysis is based on this court's redetermination of visa eligibility and the resulting changed immigration status.

Here the reversible error in *Jong Ha Wang* and the other cited immigration cases is revisited in *Fedorenko*: the findings of visa ineligibility and unlawful admission – which Congress committed exclusively to the consular officer and Attorney General – are arrogated by this Court and become the basis for revocation of citizenship. *Fedorenko* had no authorization to create its own jurisdiction, to set visa and immigration standards, determine visa ineligibility or invalidity, or to change the former lawfully-admitted status of a citizen or anyone else.

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[12]*Fedorenko* does not address §1429 in its entirety, although the text appears in fn. 36, p. 514.

[13]Section 13(a) of the 1924 Act, 43 Stat. 161, makes no reference to a "material misrepresentation," a "valid" visa, or any jurisdiction to invalidate a visa.

No reading of §1451(a) can justify *Fedorenko*'s method of denaturalization with the intent of Congress or the decisions of this Court. Congress has not given visa or immigration jurisdiction to Article III courts.

Petitioner seeks reversal of *Fedorenko*.

D. The Decisions of This Court Consistently Have Held That a Court May Not Apply Abrogated Law Without Statutory Authorization.

Fedorenko makes an additional error: it applies to its visa-invalidation method the expired DPA and the repealed Immigration Act of 1924.[14] This Court has been consistent for two hundred years, holding that a court must decide a case according to existing law, *U.S. v. Schooner Peggy*, 1 Cranch 103, 110 (1801); and that, when an act of the legislature is repealed, except as to closed matters, the law is as if it never existed, *Ex parte McCardle*, 74 U.S. 506, 514 (1868). Also, in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1973), this Court said: "[W]e anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision"; here denaturalization must refer to the law in effect when the citizenship order was entered.[15] *Fedorenko*, states the opposite.

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[14]The DPA expired August 31, 1952 (64 Stat. 225); see 50 U.S.C. App. §§1951-1965. The 1924 Act was repealed by the 1952 Act, §403(a)(23), effective December 24, 1952 (66 Stat. 279).

[15]*Tittjung* explains *Fedorenko*, noting that if it were to sustain Tittjung's argument, it then must conclude that *Fedorenko* was erroneous. (App. A, pp. 17-18a) See also *Tittjung*, fn. 7 (App. A, p.17a).

> As previously noted, petitioner was inadmissible to this country under the DPA. (p. 515)

Tittjung follows *Fedorenko* and states:

> In addition, the Supreme Court's analysis in *Fedorenko* makes clear that lawful admission is based on circumstances as they existed *at the time of initial entry*. The Court, in denaturalizing Fedorenko, looked to the law that existed *when he first entered the United States*. (emphasis added) (App. A. p. 17a)

Revocation of citizenship was decided in both cases under the expired DPA. The circuit's method of affirming the application of abrogated law cannot be justified with the consistent case law of this Court or the following statute.

1. Section 1429

Aside from the case law, Congress also has made clear that current law must be applied when granting a citizenship order. The *Tittjung* opinion ignores without comment the controlling statute, 8 U.S.C. §1429, titled "Prerequisite to naturalization; burden of proof," in effect in 1974 and today, which specifically provides in part that

> . . . no person shall be naturalized unless he has been *lawfully admitted* . . . for permanent residence *in accordance with all applicable provisions of this Act*. (emphasis added)

The mandate for determining "lawfully admitted" at naturalization requires judicial review for citizenship purposes

under the 1952 Act *exclusively*. Section 1429 was the "[p]rerequisite to naturalization" followed by the district court in 1974 when it entered the citizenship order under §1427; however, for denaturalization purposes, "lawfully admitted" was redetermined under the abrogated DPA.[16] There is no basis for this exception.

Relying on *Fedorenko* as authority, *Tittjung* makes the clearest statement that it has subject-matter jurisdiction to redetermine lawful admission under the long-expired DPA:

> . . . we conclude that the district court committed no error in canceling Tittjung's naturalization which was based on illegal entry *under the DPA*. (App. A, p. 18a) (emphasis added)[17]

Fedorenko and *Tittjung* have ignored the plain meaning of §1429.[18] Petitioner asks that both cases be reversed.

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[16]The application of §1429 to citizenship eligibility avoids substantial constitutional questions involving the Separation of Powers (see *Tittjung* [App. 12a]), Due Process (use of abrogated law), and Equal Protection (lack of standards to determine "persecution"). If at naturalization the court suspected that the petitioner was not lawfully admitted, its duty would be to deny the petition; it has no jurisdiction to change his lawfully-admitted status. The district court's opinion in *Tittjung* makes no reference to not "lawfully admitted"; however, the circuit does.

[17]*Tittjung*'s application of the abrogated DPA is in conflict with *U.S. v. Riela*, 337 F.2d 986, 989 (3rd Cir. 1964), which holds that "naturalization must be determined under . . . the statutes as they were at the time of his admission to citizenship." (cited in *Fedorenko* for other reasons, p. 502, fn. 20).

[18]At denaturalization in 1990, Tittjung did not possess an immigrant visa to be reviewed since it had been surrendered upon entry

II.

THE QUESTION PRESENTED IS IMPORTANT.

On the basis of *Fedorenko*'s method, over the last twenty years, a number of similar cases brought by OSI have resulted in the denaturalization of persons who have been law-abiding residents and citizens for fifty years or more. At present, there are at least seven denaturalization cases pending where this visa-attack method has been used or will be used to denaturalize; there certainly will be more in the future.

The fundamental question here is whether §1451 provides an Article III court with jurisdiction to substitute its judgment for that of the consular officer in visa matters.

In *Fedorenko*'s only test case, *Kungys v. United States*, 485 U.S. 759 (1988), this Court stated that the concealment and misrepresentation provisions of §1451 did not apply to an immigrant visa, and that it was "unpersuaded" that a "misrepresentation in the visa proceeding 'procures' the naturalization because it obtains . . . residence, which in turn is a prerequisite to naturalization, see 8 U.S.C. §1429." (p. 773)

The *Kungys* majority, specifically noting §1429, suggests a different question with respect to "illegally procured": if "under the statutes governing the issuance of visas in 1947, Kungys' misrepresentations and concealments *at that time rendered his visa invalid* thus causing . . . his naturalization to be 'illegally procured' under . . .

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pursuant to §2(e) of the 1924 Act, 43 Stat. 154 (see also 8 U.S.C. §1201[e]); nor did he have "lawfully admitted" immigrant status to be set aside, because he was a citizen.

§1451(a)."[19] See *Kungys*, p. 774, fn. 8. *Kungys* appears to have modified *Fedorenko*.

More confusion lies in the final phase of *Fedorenko*'s method, the invalid visa. *Kungys* asks if the visa *statutes* at the time "rendered" the visa invalid. *Fedorenko*, however, can only address this issue with two unrelated circuit cases (p. 515) which cite statutes that do not invalidate visas. As in *Fedorenko* and *Kungys*, the immigration *statutes* in effect when Tittjung entered provided only for a criminal fine and imprisonment for a willful misrepresentation, no provision in those statutes "rendered" the visa invalid.[20]

Kungys notes further that the courts attempt to clarify the materiality test have not been successful, nor have the courts of appeals been unified. This Court notes that "our one attempt to dispel confusion [citing *Fedorenko*] seemingly produced at least three variants on this Court." (citations omitted, p. 769) While this reference in *Kungys* is to materiality in the naturalization process, the *Fedorenko* citation itself creates added confusion since it refers to the materiality of a misrepresentation in visa proceedings only.

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[19]The district court in *Tittjung* specifically declined to make any finding of misrepresentation in the visa proceeding (App. C, p.47a). There is, therefore, an absence of facts to acquire jurisdiction under both *Fedorenko* and *Kungys*. See *Tittjung* (App. A, p.19a).

[20]Under §2(c) of the 1924 Act, an immigration visa was "valid" for 4 months. (43 Stat. 153). For the penalties in the statutes when Tittjung entered, see the Immigration Act of 1917, §16, 39 Stat. 874; Immigration Act of 1924, §22(c), 43 Stat. 153; Deportation Act of 1929, §2, 45 Stat. 1551; and the DPA, §14, 62 Stat. 1014, as amended, 64 Stat. 228. The current provision, 8 U.S.C. §1201(i), requires positive action by the consular officer or Secretary of State and Attorney General to revoke and invalidate a visa. Implicit in these statutes is that the person hold a visa.

Neither *Fedorenko* nor *Kungys* considered the possibility that visa review has no part in a denaturalization proceeding.[21]

This Court should ask why the Government pursues this visa-attack method under the abrogated DPA when §1451 directs the district court to the citizenship order. The simple point is that a camp guard who committed no persecutory act was visa-eligible and citizenship-qualified under the later 1952 Act. In 1974, even if the court knew of Tittjung's camp service, it was immaterial and citizenship would have been granted. In sum, this Court must consider whether or not a grave injustice is being done here.

III.

PERMITTING JUDICIAL REVIEW OF A CITIZEN'S VISA ELIGIBILITY HAS A SERIOUS EFFECT ON THE STATUS OF NATURALIZED CITIZENS.

This case presents important questions of law never considered by this Court. This Court's determination of jurisdiction will decide if Tittjung has citizenship and can remain in this country. Permitting this visa-redetermination method to stand in a denaturalization case means that any naturalized citizen can have his former visa eligibility redecided by a federal court, which then becomes the basis for an "illegally procured" citizenship order. The "sovereign prerogative" to "admit or exclude aliens" has no meaning if decades later a federal court, without statutory authority, can overrule the decisions of a consular officer and the INS and

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[21]The anomaly here is that *Fedorenko*'s visa-review and invalidation exception only pertains to a *naturalized citizen* who has no visa, not the immigrant.

declare a citizen to have been visa ineligible and not lawfully admitted when he entered. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Over one hundred years ago, this Court stated in *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895):

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have it declared policy in that regard enforced *exclusively* through executive officers, without judicial intervention, is settled by our previous adjudications. (emphasis added)

Congress has never moved from this position, nor has this Court, except in *Fedorenko*. In the most fundamental terms, §1451 does not provide visa or immigration jurisdiction in a denaturalization proceeding.

The statement of Justice Rutledge in his concurring opinion in *Schneiderman v. United States*, 320 U.S. 118, 166 (1943), is appropriate here:

> If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended, animation. He acquires but prima facie status, if that.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed December 15, 2000]

No. 00-2442

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTON TITTJUNG,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 89-C-1068. **John W. Reynolds**, Judge.

Argued November 9, 2000–December 15, 2000

Before FLAUM, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

FLAUM, *Chief Judge*. On December 14, 1990, the District Court for the Eastern District of Wisconsin determined that Anton Tittjung's position as a Nazi

concentration camp guard during World War II invalidated his previously issued visa. Therefore, the court revoked Tittjung's citizenship and cancelled his certificate of naturalization. This Court affirmed that decision. On March 24, 1994, the Immigration Court ordered the deportation of Tittjung, pursuant to the Holtzman Amendment, 8 U.S.C. § 1227(a) (4)(D) (formerly 8 U.S.C. § 1251(a)(4)(D)). The Board of Immigration Appeals ("BIA") affirmed the Immigration Court's decision, and this Court affirmed the decision of the BIA. On January 10, 2000, almost six years after his deportation was first ordered, Tittjung filed a motion to dismiss, pursuant to Fed.R.Civ.P. 60(b)(4), seeking to vacate the district court's 1990 order. The district court denied Tittjung's motion to dismiss. For the reasons stated herein, we affirm the district court's decision.

I. BACKGROUND

Anton Tittjung was born in Erdud, Yugoslavia on November 17, 1924. Beginning in October of 1942, and for the duration of World War II, Tittjung served in the Waffen SS, an organization of the Nazi government. Specifically, Tittjung was a member of the Totenkopf-Sturmbann (Death's Head Battalion), where he operated as an armed guard at the Mauthausen concentration camp and its subcamp Gross Raming.[1]

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[1]The facts concerning Tittjung's service during World War II are laid out in greater detail in our prior decision affirming the BIA's denial of Tittjung's motion for reconsideration, *Tittjung v. Reno,* 199 F.3d 393, 395 (7th Cir. 1999), as well as in the opinion by the District Court for the Eastern District of Wisconsin, cancelling Tittjung's certificate of naturalization, *United States v.*

In 1952, Tittjung applied for and obtained a visa to enter the United States pursuant to the Displaced Persons Act of 1948 ("DPA"). At no point during the application process did Tittjung disclose his association with the SS Death's Head Battalion nor his participation in Nazi persecution as a concentration camp guard. Tittjung applied for naturalization in 1973, once again concealing his Nazi wartime service. On January 9, 1974, Tittjung was naturalized and became a citizen of the United States.

On September 1, 1989, the government filed a complaint against Tittjung asking the District Court for the Eastern District of Wisconsin to revoke Tittjung's citizenship. The request for revocation was based on evidence which revealed Tittjung's history as a member of the Waffen SS and an armed concentration camp guard at Mauthausen and Gross Raming. The government moved for summary judgment, arguing that Nazi concentration camp guards were ineligible for visas under the DPA, and that as a result, Tittjung's citizenship was illegally procured. On December 14, 1990, the district court granted the government's motion. *See Tittjung*, 753 F. Supp. at 251. The court held that as a concentration camp guard, Tittjung had assisted in the persecution of persons because of their race, religion, or national origin. Because the DPA, as amended in 1950, made all persons who assisted Nazi Germany in the persecution of civilian populations of countries ineligible for visas, Tittjung

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Tittjung, 753 F. Supp. 251, 252-55 (E.D. Wis. 1990). As Tittjung's present motion is a collateral attack on subject matter jurisdiction, we need not revisit those facts.

was ineligible for a visa when he entered the United States. To be eligible for naturalization, a person must have been lawfully admitted into the United States with a valid immigration visa. *See* 8 U.S.C. § 1427(a)(1). The court determined that because Tittjung's visa was invalid, he was never lawfully admitted into the United States. Since Tittjung had not satisfied the prerequisites for naturalization, the court revoked his citizenship, set aside its January 9, 1974 order admitting Tittjung to citizenship, and cancelled Tittjung's certification of naturalization. *See Tittjung,* 753 F. Supp. at 256-57. Because Tittjung's guard service required his denaturalization as a matter of law, the district court did not address allegations that Tittjung misrepresented his World War II service to visa officials and thereby entered the United States by means of fraud. *Id.* at 257. This Court affirmed the district court's order in an opinion dated November 14, 1991, 948 F.2d 1292 (7th Cir. 1991), and the Supreme Court thereafter denied *certiorari,* 505 U.S. 1222 (1992).

As a result of the district court's 1990 decision, Tittjung reverted to alien status and was thus removable. On May 11, 1992, the government commenced deportation proceedings against Tittjung. The Immigration Court, on March 24, 1994, ordered Tittjung's deportation pursuant to the Holtzman Amendment.[2] Tittjung appealed the decision of the Immigration Court to the BIA. On August 13, 1997, the

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[2]The Holtzman Amendment requires the deportation of aliens found to have "assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion under the direction of, or in association with, the Nazi government of Germany." 8 U.S.C. § 1251 (a)(4)(D) (now codified as 8 U.S.C. § 1227(a)(4)(D)).

BIA affirmed the deportation order and dismissed Tittjung's appeal. Tittjung then filed a motion for reconsideration, which the BIA denied on August 27, 1998. On December 2, 1999, this Court affirmed the BIA's decision. *Tittjung v. Reno,* 199 F.3d at 393, *reh'g denied,* No. 98-3407 (Feb. 9, 2000). On June 29, 2000, the Supreme Court denied *certiorari.* ___ U.S. ___, 120 S. Ct. 2746.

Faced with an imminent deportation, Tittjung filed a motion with the District Court for the Eastern District of Wisconsin, seeking to vacate the 1990 denaturalization judgment and dismiss the complaint. Tittjung argued that the 1990 judgment was void under Fed.R.Civ.P. 60(b)(4) on the ground that the district court lacked subject matter jurisdiction. On April 27, 2000, that motion was denied by the district court. Tittjung now appeals, arguing that: (1) there is no Article III jurisdiction to redetermine visa eligibility, and on that basis find that Tittjung was not lawfully admitted when he was granted citizenship; (2) it is an unconstitutional encroachment into an executive function for the judiciary to redetermine visa eligibility; (3) since the DPA is no longer in effect, the district court cannot make a finding of visa ineligibility and unlawful admission based on that law; (4) the court had to make certain factual findings, including that Tittjung made a misrepresentation in order to obtain a visa, before it could hold that he illegally obtained a visa and was thus not "lawfully admitted."

II. DISCUSSION

A. Rule 60(b)(4) Standard of Review

Tittjung's present motion challenges the jurisdiction of the District Court for the Eastern District of Wisconsin to determine that he was visa ineligible when he entered the United States in 1952. No court may decide a case without subject matter jurisdiction, and neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998); *see also United States v. County of Cook, Ill.*, 167 F.3d 381, 387-88 (7th Cir. 1999). To further that end, "It is the duty of this court to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *EEOC v. Chicago Club*, 86 F.3d 1423, 1428 (7th Cir. 1996) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). Therefore, if the parties neglect the subject, a court must raise the jurisdictional question on its own. *Christianson*, 486 U.S. at 818. However, in unexceptional circumstances, a party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack following an adverse judgment. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

The exception to the general rule barring collateral attacks on subject matter jurisdiction flows from Fed.R.

Civ.P. 60(b)(4).[3] Yet that exception is narrowly tailored, such that a lack of subject matter jurisdiction will not always render a final judgment "void." Only when the jurisdictional error is "egregious" will courts treat the judgment as void. *In re Edwards,* 962 F.2d 641, 644 (7th Cir. 1992). To be egregious, and thus void under Rule 60(b)(4), the error must involve a clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority. *See O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.,* 201 F.3d 948, 951 (7th Cir. 2000); *Edwards,* 962 F.2d at 644; *Kansas City S. Ry. v. Great Lakes Carbon Corp.,* 624 F.2d 822, 825 (8th Cir. 1979). "If it is not egregious, the courts say that the court that issued the judgment in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack, like any other erroneous but final judgment." *Edwards,* 962 F.2d at 644. Here, the district court did not find any jurisdictional errors let alone egregious ones. We review de novo the denial of a motion to vacate a judgment as "void" under Fed.R.Civ.P. 60(b)(4). *Federal Election Comm'n v. Al Salvi for Senate Comm.,* 205 F.3d 1015 (7th Cir. 2000).

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[3]Rule 60(b)(4) states in relevant part: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

B. Tittjung's Jurisdictional Arguments

1. The District Court's Jurisdiction to Review a Visa

Tittjung's overarching claim on appeal is that a district court lacks subject matter jurisdiction to review a visa eligibility determination and on that basis vacate an order of naturalization. We note at the outset that Tittjung's status as visa eligible has been at issue in Article III proceedings for approximately eleven years to date. To say that Tittjung has had ample opportunity to raise this issue is to understate the matter. Moreover, Tittjung has previously admitted that the courts do have jurisdiction to examine his visa eligibility. The original complaint, filed in 1989, specifically alleged that the district court had jurisdiction pursuant to 28 U.S.C. § 1345 (original jurisdiction over all civil actions brought by the government) and 8 U.S.C. § 1451(a) (jurisdiction to revoke citizenship). Tittjung admitted that allegation, and has never challenged the district court's determination that it had jurisdiction, either in this Court or in the Supreme Court. Therefore, unless an error of the aforementioned egregious nature has been made, *res judicata* bars Tittjung's claim. *See County of Cook, Ill.*, 167 F.3d at 388.

We begin with 8 U.S.C. § 1451(a). That statute expressly confers jurisdiction upon district courts to decide suits brought to revoke citizenship illegally procured. Specifically, the statute reads in relevant part that:

It shall be the duty of the United States Attorney for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the

United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . ."

Tittjung argues that 8 U.S.C. § 1451(a) is inapplicable to his situation, as he did not illegally procure his citizenship. According to Tittjung, if any illegality took place, it was at the visa procurement phase, when Tittjung did not disclose his service as a concentration camp guard. Yet those actions, he urges, are in effect shielded from review, as he claims that his certificate of naturalization was based on compliance with all applicable provisions. Thus, when the district court in 1990 determined Tittjung to be visa ineligible and therefore revoked his citizenship, the court, he suggests, traveled beyond the scope granted by 8 U.S.C. § 1451(a).

We do not believe, nor have we found any case law to suggest that a certificate of naturalization acts as a *tabla rosa,* thereby precluding us from examining the validity of the visa upon which that certificate was granted. To begin with, Supreme Court precedent forecloses that argument. In *Fedorenko v. United States,* the Court was called upon to decide whether Fedorenko's citizenship was illegally procured, and therefore subject to revocation. 449 U.S. 490 (1981). As in the case of Tittjung, Fedorenko entered the

United States under the DPA, was naturalized years later, and was having his citizenship challenged on the basis that his service as a concentration camp guard rendered him visa ineligible. *See id.* at 508-09 ("The Government [was] seeking to revoke petitioner's citizenship because of the alleged unlawfulness of his initial entry into the United States."). After the Court determined that Fedorenko's World War II service made him ineligible for a visa, it perceived the resolution of the case to be "fairly straightforward." *Id.* at 514. Justice Marshall, writing for the Court noted that Supreme Court "cases have established that a naturalized citizen's failure to comply with statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)." *Id.* The Court observed that the statutory prerequisites required that the individual be lawfully admitted to the United States for permanent residence, 8 U.S.C. § 1427, and that "lawful admission for permanent residence in turn required that the individual possess a valid unexpired immigrant visa." *Id.* at 514-15; *see also* 8 U.S.C. § 1181(a). Because the DPA excluded from the definition of displaced persons eligible for immigration to this country those who had "assisted the enemy in persecuting civilians" or had "voluntarily assisted the enemy forces . . . in their operations," Pub. L. No. 87-774, ch. 647, 62 Stat. 1009, *amended by* Pub. L. No. 81-555, ch. 262, 64 Stat. 219 (1950), Fedorenko's visa, granted under the DPA, was invalid at the time of issuance. Thus, the Court found that 8 U.S.C. § 1451(a) provides a federal court with jurisdiction to make a determination of visa eligibility at the time of entrance into the United States and revocation of citizenship based on a finding of visa ineligibility.

We find that Supreme Court precedent controls and forecloses the type of claim that Tittjung now raises. In addition, though we have not to this point expressly addressed this type of jurisdictional argument, we find our previous decisions upholding the revocation of naturalization certificates based on visa ineligibility to be *de facto* confirmation that Tittjung's argument is meritless. As stated above, "it is the duty of this court to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'" *EEOC* 86 F.3d at 1428, such that if the parties neglect the subject, a court must raise the jurisdictional question on its own, *Christianson*, 486 U.S. at 818. In *United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991), as well as in *United States v. Ciurinskas*, 976 F. Supp. 1167 (N.D. Ind. 1997), *aff'd*, 148 F.3d 729 (7th Cir. 1998) and *United States v. Hajda*, 963 F. Supp. 1452 (N.D. Ill. 1997), *aff'd* 135 F.3d 439 (7th Cir. 1998), we were faced with denaturalization orders based on determinations of visa ineligibility. That we reached the merits in those cases casts into doubt any suggestion that we do not believe there is jurisdiction to find visa ineligibility and thus revoke a certificate of naturalization.[4]

As we have just noted, this specific subject matter jurisdiction argument has been resolved repeatedly. However, to the extent that previous decisions of this Court may have

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[4]We further note that other federal courts applying 8 U.S.C. § 1451(a) have similarly held that entry with an unlawfully obtained visa renders naturalized citizenship illegally procured. *See, e.g. United States v. Stelmokas*, 100 F.3d 302 (3rd Cir. 1996); *United States v. Koziy*, 728 F.2d 1314 (11th Cir. 1984); *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981).

left the matter unclear, we now state unequivocally that Article III courts have jurisdiction to vacate an order of naturalization when that order is based on an illegally obtained visa. Here, Tittjung's status as a former concentration camp guard made him ineligible to receive a visa. *Fedorenko,* 449 U.S. at 511, 514. Therefore, when Tittjung entered this country, he did so with an invalid visa. By entering this country with an invalid visa, Tittjung failed to gain lawful admission to the United States. *See* 8 U.S.C. § 1181(a)(1); *Fedorenko,* 449 U.S. at 514-15. Because Tittjung could not be naturalized until he had first been lawfully admitted for permanent residence, *see* 8 U.S.C. § 1427(a)(1), his citizenship was illegally procured. Thus, the district court had the power to revoke his certificate of naturalization and cancel his citizenship. *See* 8 U.S.C. § 1451(a). Consequently, we agree with the court below that there was no jurisdictional error, let alone an egregious one, in the 1990 actions of the district court.

2. Separation of Powers and Jurisdiction

In addition to the primary subject matter jurisdiction contention set forth above, Tittjung presents a number of arguments which he believes negate any federal jurisdiction conferred by 8 U.S.C. § 1451(a). Tittjung's first such argument is that the district court's redetermination of visa eligibility and declaration that admission was unlawful "is an unconstitutional judicial encroachment into an exclusive Executive function . . . and it violates the constitutional doctrine of Separation of Powers." For support to his argument, Tittjung looks to language in the Immigration and Nationality Act of 8 U.S.C. § 1101 et seq. ("1952 Act").

Under Section 1103(a)(1) "The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens. . ." Additionally, Tittjung cites to Section 1103(c), which empowers the Commissioner of Immigration with any and all responsibilities of the Attorney General that the Attorney General delegates to her, and Section 1104(a), which charges the Secretary of State with the administration and enforcement of the Act and other laws "except those powers, duties, and functions conferred upon the consular officers relating to the granting and refusal of visas." Thus, Tittjung puts forth that Article III courts are without jurisdiction to proceed in reviewing visas and cancelling certificates of naturalization based on their findings of visa ineligibility.

Tittjung's argument is without merit. While Tittjung is correct that our system does delegate specific powers to specific branches of government, he fails to acknowledge that ours is a system of checks and balances. Under Article 1, Section 8 of the United States Constitution, Congress is empowered to establish standards for immigration. The 1952 Act delegates to the Executive Branch, and specifically the Attorney General, the powers of administration and enforcement. In such a situation, "the courts, when a case or controversy arises, can always 'ascertain whether the will of Congress has been obeyed' and can enforce adherence to statutory standards." *See Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 954 (1983) (citing *Yakus v. United States,* 321 U.S. 414, 425 (1944) and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952)). The Court in Fedorenko acknowledged this mandated interplay between the branches as well as the power of Article III

courts to review "lawful admissions." Justice Marshall, writing for the Court noted "This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this priceless treasure." *Fedorenko,* 449 U.S. at 506-07 (internal quotation omitted).

We stated above that Article III courts do have the power, in the course of determining whether the statutory prerequisites for naturalization have been met, to examine visa eligibility. Were we to hold that separation of powers bars examination of visa eligibility by Article III courts, we would be substantially limiting the impact of 8 U.S.C. § 1451. Contrary to Tittjung's assertion, the fact that Congress delegated authority to the Executive to oversee matters of immigration does not mean that the Attorney General was provided with exclusive control for the entire area. Section 1451(a) allows for the district courts to, among other things, revoke or set aside certificates of naturalization (which are based on compliance with statutory prerequisites such as a valid visa). Furthermore, Congress recognized that the Judiciary and the Executive would both make denaturalization decisions. It is for that reason that 8 U.S.C. § 1451(h) provides that "Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person." Given this limitation on the power of the Judiciary, the district court was correct to determine that the 1990 revocation of

Tittjung's naturalization does not substantially or unconstitutionally infringe on the Attorney General's authority.[5] Thus we find no jurisdictional defect, egregious or otherwise in the 1990 district court's actions.

3. Expiration of the DPA and Jurisdiction

Tittjung next argues that the district court lacked jurisdiction to consider his unlawful entry in 1952 because the Immigration Act of 1924 and the DPA (the laws pursuant to which he was granted his visa) were no longer in effect at the time of his naturalization in 1974. Specifically, Tittjung claims that because these statutes did not exist and were not considered when the Milwaukee court entered its citizenship order in 1974, it was nonsensical for the district court to reference and apply those laws during the denaturalization proceedings.[6] In support of his position, Tittjung cites to Ex

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[5]Tittjung cannot contest that under 8 U.S.C. § 1201(i) a visa once granted can be revoked at any time, and that under 8 U.S.C. § 1227(a)(1)(A) and (B) an alien found to have unlawfully obtained a visa is subject to deportation. Yet, as he did above, Tittjung attempts to argue that the further illegal act of exploiting an invalid visa in order to obtain citizenship somehow immunizes the illegal entrant from punishment for her first violation, and actually rewards the second indiscretion by making denaturalization unavailable. We cannot conclude that Congress intended to establish such a system where compounded illegality is rewarded.

[6]We note that this argument, at best, is tangentially related to federal jurisdiction. The basis for the court's determination that Tittjung was not lawfully admitted into the United States does not implicate federal court jurisdiction (in the usual sense), which we

Parte McCardle, where the court determined that the passage of a bill repealing the portion of a statute that conferred appellate jurisdiction on the Supreme Court over habeas proceedings meant that the Court no longer had jurisdiction to hear McCardle's appeal. 74 U.S. 506, 19 L. Ed. 264 (1868).

> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Id. at 514.

Tittjung's position lacks merit. Throughout his argument, Tittjung goes to great lengths to suggest that his naturalization should not be tied to whether he lawfully procured his visa. Rather, he suggests the relevant factor to

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have previously noted is granted by 8 U.S.C. § 1451(a). The Supreme Court has described the term "jurisdiction" as "a word of many, too many meanings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998), which has led to much confusion surrounding what is appropriately considered in a Rule 60(b)(4) motion. It is because of this uncertainty, as well as our desire to provide a measure of finality to these proceedings, that we nonetheless proceed cautiously, assume arguendo that the claim is jurisdictional in nature, and address it.

be that he complied with the statutory prerequisites to naturalization. While we have noted that the district court had jurisdiction to revoke Tittjung's certificate of naturalization after determining that he was visa ineligible as a matter of law, we have never wavered from our understanding that the basis for the determination that Tittjung was removable was that he was never lawfully admitted to this country, a required prerequisite to naturalization under 8 U.S.C. § 1427. That statute, which is ultimately the relevant one for purposes of determining naturalization, was in effect in 1974 when Tittjung was naturalized as well as when this denaturalization case was brought and decided.[7]

In addition, the Supreme Court's analysis in Fedorenko makes clear that lawful admission is based on circumstances as they existed at the time of initial entry. The Court, in denaturalizing Fedorenko, looked to the law that existed when he first entered the United States. "Lawful admission for permanent residence in turn required that the individual possess a valid unexpired immigrant visa. At the time of petitioner's initial entry into this country, § 13(a) of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952), provided that 'no immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa . . . .'" *Fedorenko*, 449 U.S. at 514-15. Applying Tittjung's present argument would

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[7]Additionally, we note that to the extent that this is a jurisdictional argument, the fact that the Supreme Court in *Fedorenko* was not troubled with the removal of the defendant in light of the fact that the DPA was no longer in effect lends support to our present stance.

mandate the conclusion that the Court in Fedorenko erred by revoking a naturalization because the law that allowed for the initial entry of the defendant was no longer in effect at the time of the denaturalization. We do not believe it would be proper to reach such a conclusion.

Not only would granting Tittjung's argument require us to challenge Supreme Court precedent, but doing so would also erode a large portion of 18 U.S.C. § 1451 (a). The DPA was in existence for four years from 1948-1952. The statutory prerequisite for naturalization is five years of continuous legal residence in the United States. 8 U.S.C. § 1427. Therefore, no person could have been admitted to the United States under the DPA and been naturalized within the period of the law's existence. As such, according to Tittjung's position, denaturalization proceedings under 8 U.S.C. § 1451(a) could never be brought against one who entered under the DPA. Given that the DPA was "intended to prevent those who contributed to the Nazi persecution of innocent civilians from obtaining visas to enter the United States as refugees," *Schmidt*, 923 F.2d at 1259, it would seem anomalous that the law provides uncontestable permanent residence for those who illegally circumvented it. For these reasons, we conclude that the district court committed no error in cancelling Tittjung's naturalization which was based on illegal entry under the DPA.

4. Factual Findings as Prerequisites to Jurisdiction

Tittjung posits that even if this Court does not agree that his previous arguments negate federal jurisdiction, the district court's omission of certain factual findings precludes

a determination that Tittjung illegally procured his citizenship. The court below found this argument to be "a substantive one which is precluded by res judicata and cannot be grafted upon a motion to dismiss for lack of subject matter jurisdiction." Yet, in support of the proposition that certain factual findings are within the scope of a Rule 60(b)(4) review on subject matter jurisdiction, Tittjung cites to language in Fedorenko which states that "In the lexicon of our cases, one of the jurisdictional facts upon which the grant [of citizenship] is predicated, was missing at the time petitioner became a citizen." 449 U.S. at 515-16 (internal quotation omitted). As we noted above, the term jurisdiction has so many uses that it is commonplace for confusion to ensue regarding the term. *See United States v. Krilich,* 209 F.3d 968, 971 (7th Cir. 2000); *see also Steel Co.*, 523 U.S. at 90. While we express doubt that this argument of Tittjung's is jurisdictional such that it properly comes within the scope of our review of a motion to dismiss for lack of subject-matter jurisdiction, we assume arguendo that it does and proceed to analyze the claim.

Tittjung asserts that the district court was required to find that "Tittjung made a material misrepresentation under DPA § 10," and "that the invalid visa resulted in an unlawful admission," in order to find that Tittjung illegally procured his citizenship. We do not dispute that the language of § 10 of the DPA states that "Any person who shall willfully make a representation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Nor do we contest that Fedorenko makes clear that under § 13(a) of the Immigration and Nationality Act of 1924, "a visa obtained through a material misrepresentation [is] not valid." 449 U.S.

at 515. However, we do not read § 10 of the DPA and § 3(a) of the 1924 Act as establishing an exclusive basis for visa ineligibility. To adopt Tittjung's reasoning, we would be forced to ignore the plain language of § 13(a) of the DPA as amended in 1950, something we cannot do. That Section states that "No visas shall be issued under the provision of this Act, as amended . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin." Section 13(a) does not contain a fraud element, but rather provides wholly independent grounds for denaturalization. The district court in 1990 was well within its authority to find that Tittjung's service as an armed concentration camp guard meant that he had assisted in the persecution of persons because of their race, religion or national origin,[8] and that his "assistance in persecution" rendered him visa ineligible. Once that determination was made, the court did not and was under no obligation to assess

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[8]The proposition that an armed concentration camp guard "assisted in persecution" (as is understood in the DPA) cannot be disputed. In Schmidt, we stated "it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA." 923 F.2d at 1258. Additionally we noted in *Schellong v. INS*, that "Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." 805 F.2d 655, 661 (7th Cir. 1986). *See also Fedorenko*, 449 U.S. at 513-16; *United States v. Leprich*, 666 F. Supp. 967, 969 (E.D. Mich. 1987) ("Because Leprich was a concentration camp guard, he was ineligible for the visa he received and his citizenship was illegally procured.").

whether Tittjung had made misrepresentations in order to procure his visa.

Requiring a finding of misrepresentation in order to determine illegal procurement would not only be inconsistent with the plain meaning of the DPA, but would be in direct conflict with previous federal case law on the matter. The approach taken in Tittjung, that once a determination of visa ineligibility is made on "assistance in persecution" grounds there is no need to address a possible "misrepresentation" basis for ineligibility, has been continually applied. For example, in Schmidt, after determining that the defendant had assisted in persecution thus making him ineligible for a visa and mandating his denaturalization, the district court found it unnecessary to decide whether he also entered unlawfully by misrepresenting such service to immigration authorities. See *United States v. Schmidt,* 1990 U.S. Dist. LEXIS 34, No. 88 C 9475, 1990 WL 6667 at *2 (N.D. Ill. Jan 3, 1990). Similarly, in Leprich, the court noted that the visa of a concentration camp guard "would have been illegally procured under [DPA] Section 13 even if he had secured it without making misrepresentations." 666 F. Supp. at 969. *See also United States v. Kairys,* 600 F. Supp. 1254, 1265-66 (N.D. Ill. 1984) (Kairys was visa ineligible even though there was insufficient proof of misrepresentation.). In light of this consistent approach, as well as because of the plain meaning of § 13(a) of the DPA, we hold that the district court was able to find that Tittjung illegally procured his citizenship without making the suggested factual finding. To the extent that Tittjung urges that the factual finding of misrepresentation was "jurisdictional" we see no jurisdictional error, let alone an egregious one, in the method employed by the district court in its 1990 decision.

5. Tittjung's Additional Arguments

Finally we note that Tittjung's brief contains factual arguments, many of which were presented in the district court. The fact issues surrounding Tittjung's cases have already been determined, and are therefore outside the scope of review of a collateral attack on subject matter jurisdiction. In an effort to have this court address these claims Tittjung labels these arguments "jurisdictional." However, Tittjung cannot bring his arguments on the merits within this Rule 60(b)(4) review simply by relabelling them "jurisdictional." Therefore, we do not address these arguments.

III. CONCLUSION

> The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.

In re Factor VIII or IX Concentrate Blood Prod. Lit., 159 F.3d 1016, 1019 (7th Cir. 1998). We have examined Tittjung's claims extensively, recognizing the gravity of the ramifications of our decision. Our exhaustive inspection leads us to conclude that those claims have no merit. As such, it is time for the principle that "litigation must have an end" to prevail. We believe that now, more than ten years since these

proceedings began and approximately 48 years since the illegal entry occurred, the time has come for the Immigration Court's order of deportation to be carried out. We see no reason for further delay.

For the foregoing reasons, we Affirm the decision of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed April 27, 2000]

Civil Action No. 89-C-1068

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTON TITTJUNG,
Defendant

DECISION AND ORDER DATED APRIL 27, 2000
DENYING DEFENDANT'S MOTION TO DISMISS

In 1990, this court granted plaintiff United States of America ("the government") summary judgment in this action and revoked defendant Anton Tittjung's ("Tittjung") citizenship. Now, on the verge of deportation, Tittjung revives this action by bringing a motion to dismiss for lack of subject matter jurisdiction. The court will deny Tittjung's motion.

BACKGROUND[1]

During World War II, Tittjung was a member of the Totenkopf-Sturmbann organization within the Waffen-SS and served as a guard at the Mauthausen concentration camp in Austria. After the war Tittjung applied for an immigration visa to the United States but did not disclose, during the application and approval process, his past history as a Nazi concentration camp guard. In 1952, Tittjung was certified as a displaced person and given an immigration visa to the United States under the Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 87-774, ch. 647, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950). On January 9, 1974, Tittjung was naturalized and became a United States citizen.

On September 1, 1989, the government filed a complaint against Tittjung asking this court to revoke Tittjung's citizenship on the basis of evidence that revealed Tittjung's past history as a member of the Waffen-SS. The government then moved for summary judgment, arguing that Nazi concentration camp guards were ineligible for visas under the DPA, and that as a result, Tittjung's citizenship was illegally procured.

On December 14, 1990, this court granted the government's motion for summary judgment, finding that the government proved Tittjung was a Waffen-SS guard at

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[1]The facts in the background are taken from the court's previous findings of fact in United States v. Tittjung, 753 F. Supp. 251 (E.D. Wis. 1990).

Mauthausen concentration camp during World War II. The DPA, as amended in 1950, made all persons who assisted Nazi Germany in the persecution of civil populations of countries ineligible for visas. See 64 Stat. 219, 230 (June 16, 1951). To be eligible for naturalization, a person must have been "lawfully admitted" into the United States with a valid immigration visa. See 8 U.S.C. § 1427(a)(1). Therefore, Tittjung's visa was invalid, and he was never "lawfully admitted" into the United States Because Tittjung did not satisfy the prerequisites for naturalization, this court revoked his citizenship, set aside its January 9, 1974 order admitting Tittjung to citizenship, and cancelled Tittjung's certificate of naturalization. See United States v. Tittjung, 753 F. Supp. 251 (E.D. Wis. 1990).

As a result of the court's decision, Tittjung reverted to alien status and thus was removable. On May 11, 1992, the government commenced deportation proceedings against Tittjung. On March 24, 1994, the Immigration Court ordered Tittjung's deportation. On August 27, 1998, the Board of Immigration Appeals ("BIA") denied Tittjung's motion for reconsideration. On December 2, 1999, the Seventh Circuit affirmed the BIA's decision. On January 10, 2000, Tittjung filed the instant motion to dismiss for lack of jurisdiction, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(h)(3), and 60(b)(4). Tittjung makes three jurisdictional arguments. First, Tittjung claims that only the United States Attorney General ("Attorney General") or other executive officials can determine whether a person was "lawfully admitted" as contemplated in § 101(a)(20) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101(a)(20). The courts lack the authority to make visa and entry redetermination, according to Tittjung, so his visa

issuance is non-reviewable by this court. Second, Tittjung argues that the court cannot determine visa eligibility that was based upon laws since repealed. The DPA is no longer in effect, so Tittjung contends that this court can no longer enforce it against someone who illegally entered the United States under its provisions. Third, Tittjung maintains that the court had to find he made a misrepresentation in order to obtain a visa before it could hold that he illegally obtained one and was not "lawfully admitted."

DISCUSSION

Courts have jurisdiction to determine their jurisdiction. See Resolution Trust Corp. v. Lightfoot, 938 F.2d 65, 67 (7th Cir. 1991). In general, a defense of lack of subject matter jurisdiction may be raised at anytime. See Sullivan v. Lemoncello, 36 F.3d 676, 682 (7th Cir. 1994). However, courts will not permit collateral attacks on jurisdiction after a final judgment was entered against the movant.

> But if the court decides a case on the merits after an adversarial presentation, the judgment cannot be collaterally attacked on the ground that the court lacked subject-matter jurisdiction. The parties' failure to address jurisdiction fully or cogently does not deprive the judgment of force. . . . Indeed, the parties' failure to address a jurisdictional issue at *all* does not diminish the authority of the judgment.

United States v. County of Cook, Ill., 167 F.3d 381, 388 (7th Cir. 1999) (citing Durfee v. Duke, 375 U.S. 106 (1963);

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)). Tittjung's instant motion to dismiss is such a collateral attack on an adverse judgment, filed as a last-ditch effort to avoid deportation.

Courts provide for exceptions to this rule under Federal Rule of Civil Procedure 60(b)(4) ("Rule 60(b)(4)"), but the standard is a formidable one. Under Rule 60(b)(4), only grave errors of jurisdiction will lead to a voiding of a final judgment.

> The principle that jurisdictional defects may be noticed at any time is limited . . . by the equally important principle that litigation must have an end. After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.

In re Factor VIII or IX Concen. Blood Prod. Lit., 159 F.3d 1016, 1019 (7th Cir. 1998). Tittjung fails to show that the court's exercise of jurisdiction was an egregious error.

A. Collateral Attack

In this case, the court did render a final judgment based upon briefing on the merits of the action, which included a discussion of subject matter jurisdiction. The government's complaint claimed this court had subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1345

(original jurisdiction over all civil actions brought by the government); 8 U.S.C. § 1421(a) (jurisdiction to naturalize persons); and 8 U.S.C. § 1451(a) (jurisdiction to revoke citizenship). (Def.'s Jan. 10, 2000 Mot. to Dismiss ("Mot. to Dismiss") Ex. A ¶ 4.) Tittjung admitted in his answer that the court had jurisdiction. (Pl.'s Feb. 2, 2000 Resp. to Mot. to Dismiss App. 2.)

The court also found that it had subject matter jurisdiction over this action under the statutory authority cited by the government. See United States v. Tittjung, 753 F. Supp. 251 (E.D. Wis. 1990). Finally, Tittjung did not raise any jurisdictional challenge in his appeal to the Seventh Circuit. See United States v. Tittjung, 948 F.2d 1292, 1991 WL 237632 (7th Cir. Nov. 14, 1991). In affirming the decision of the court, the Seventh Circuit implicitly found that it and this court had subject matter jurisdiction over the action and could determine whether Tittjung's visa was improperly issued. "It is the duty of this court [the Seventh Circuit] to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" E.E.O.C. v Chicago Club, 86 F.3d 1423, 1428 (7th Cir. 1996) (citing Mitchell v. Maurer, 293 U.S. 237, 244 (1934)). Therefore, Tittjung's instant motion must be construed as a collateral attack on a final order and judgment on the merits in this action. The court cannot entertain such a motion unless it falls within one of the rare exceptions to this rule.

B. Rule 60(b)(4)

If the defense of lack of subject matter jurisdiction is raised for the first time after a final order and judgment has been rendered by the court, then it will be considered in the

context of a motion for relief from the judgment under Rule 60(b)(4) (relief from judgment or order that is void). "After final judgment a lack of subject matter jurisdiction may be interposed as a motion for relief from the judgment under Rule 60(b)(4)." 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1990). Therefore, the court will consider Tittjung' motion to dismiss as a motion for relief from judgment on the grounds that it is void due to the issuing court's lack of subject matter jurisdiction.

Under Rule 60(b)(4), a judgment is void if there was an egregious error concerning jurisdiction. The Seventh Circuit refers to the Restatement (Second) of Judgments § 12 enumeration of specific exceptions.

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if: (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the

> judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

United States v. County of Cook, Ill., 167 F.3d. at 388.

Tittjung has failed to show that any of these exceptions apply. First, the fact that higher courts have addressed the issue of visa ineligibility thwarts any claim that this court's review of the case was a "manifest abuse of authority." See United States v. Breyer, 41 F.3d 884 (3rd Cir. 1994). In fact, Tittjung's brief in support of his motion to dismiss cites to Fedorenko v. United States, 449 U.S. (1981), in which the Supreme Court explicitly addresses the issue of whether the plaintiff in that case illegally obtained a visa.

Second, Tittjung argues that judicial review of visa eligibility in considering revocations of citizenship infringes upon the exclusive power of the Attorney General. To support this argument, Tittjung cites to the general statutory provision giving the Attorney General authority over immigration matters. See 8 U.S.C. § 1103. However, Congress provides for judicial review of orders of naturalization and also specifies that "[n]othing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person." 8 U.S.C. § 1451(a), (h). Therefore, the court's revocation of Tittjung's naturalization does not substantially infringe upon the Attorney General's authority.

Finally, Tittjung makes the argument that the court could not find he was ineligible for a visa without finding he made misrepresentation to obtain his visa. This argument,

however, is a substantive one which is precluded by res judicata and cannot be grafted upon a motion to dismiss for lack of subject matter jurisdiction. "For res judicata to apply in federal court three requirements must be met: (1) an identity of the causes of action; (2) an identity of the parties or their privies; and (3) a final judgment on the merits." Roboserve, Inc. v. Kato Kagaku Co., 121 F.3d 1027, 1034 (7th Cir. 1997) (citing Golden v. Barenborg, 53 F.3d 866, 869 (7th Cir. 1995)). In this case, it is clear that all three requirements have been fulfilled. Therefore, the court cannot address substantive arguments as "[r]es judicata, however, operates not only as a bar to the further litigation of matters decided in the prior action, but also to any issues which could have been raised." Id at 869-70 (citations omitted).

CONCLUSION

Plaintiff Anton Tittjung's motion to dismiss is **DENIED**.

SO ORDERED this 27th day of April, 2000.

/s/_____
John W. Reynolds
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

[Decided and Filed December 14, 1990]

Civil Action No. 89-C-1068

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTON TITTJUNG,
Defendant

JOHN W. REYNOLDS, SENIOR UNITED STATES DISTRICT JUDGE

OPINION

I. BACKGROUND

On September 1, 1989, plaintiff, United States of America ("the Government"), brought this action pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1451(a), to revoke the United States citizenship of defendant Anton Tittjung ("Tittjung"), to set aside the January 9, 1974 order of this

court admitting Tittjung to citizenship, and to cancel Tittjung's Certificate of Naturalization, No. 9785345, issued pursuant to that order. As the basis for its complaint, the Government alleges that Tittjung served as an armed concentration camp guard and therefore procured his citizenship illegally.

On August 16, 1990, the Government filed a motion for summary judgment. This court denied the Government's motion for summary judgment on October 19, 1990, because material issues of fact remained in dispute. Subsequently, this court held a trial on this matter, which commenced on October 31, 1990, and concluded on November 2, 1990. During the trial, this court heard live witness testimony and received various Government exhibits regarding the nature of concentration camps and the role of armed prison guards in such camps. This court also received, and heard testimony authenticating, Government exhibits establishing that Tittjung had served in the Waffen-SS as an armed concentration camp guard. At trial, Tittjung offered no evidence or testimony to the contrary. On the basis of the trial, this court concludes that Tittjung did serve as an armed concentration camp guard and therefore holds that Tittjung's citizenship must be revoked and his Certificate of Naturalization cancelled as a matter of law.

II. JURISDICTION

The following statutes grant this court jurisdiction over this matter: (1) 28 U.S.C. § 1345 (except as otherwise provided, the United States district courts shall have original jurisdiction of all civil actions commenced by the United States); (2) 8 U.S.C. § 1421(a) (jurisdiction to naturalize

persons as citizens is conferred on United States district courts); and (3) 8 U.S.C. § 1451(a) (action to revoke citizenship to be brought in any court specified in 8 U.S.C. § 1421(a)).

Venue is proper in this district under *8 U.S.C. § 1451*(a), which permits an action to revoke citizenship to be brought in the judicial district in which the naturalized citizen resides at the time of bringing suit.

III. FINDINGS OF FACT

A. *Defendant Tittjung's Background.*

Tittjung was born on November 17, 1924, in Erdud,[1] Yugoslavia (Exh. 1 at 2, 4, 9, 21, 23, 27, and 35; Exh. 10 at 4; Exh. 12). From birth until 1933, Tittjung lived in Erdud where he attended primary school (Exh. 12). Between 1933 and 1937, Tittjung attended secondary school in Belgrade, Yugoslavia (*Id.*). Thereafter, Tittjung returned to Erdud where he resided until 1942 (*Id.*; Exh. 1 at 5).

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[1]The name of this town appears in some documents as "Erdut," rather than "Erdud."

B. *Defendant Tittjung's Service as an SS Guard.*

Tittjung joined[2] the Waffen-SS in October 1942 and remained in the Waffen-SS until the conclusion of the war in 1945 (Exh. 1 at 5; Exh. 12 at 3). Tittjung was a member of the Totenkopf-Sturmbann.[3] (Exh. 14 at 1, entry 100). Tittjung wore that organization's symbol, a skull and crossbones, on the collar of his uniform (Testimony of historian Charles Sydnor, Jr.). While a member of the Totenkopf-Sturmbann, Tittjung served as a guard at the Mauthausen Concentration Camp and its subcamp Gross Raming (Testimony of Sydnor; Exh. 14, entry 100).

Tittjung's service as an armed guard is clearly and convincingly documented by an SS-prepared roster dated July 26, 1944. The roster indicates that an Anton Tittjung was a member of the 5th Company of SS Death's Head Battalion headquartered at Mauthausen who was stationed at Gross

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[2]Mr. Tittjung told the Displaced Persons Commission that he had been conscripted into the Waffen-SS in October 1942 (Ex. 1 at 5). According to the documentary evidence and trial testimony, however, the SS had not yet reached an agreement with the government of Croatia on the conscription of ethnic Germans as of that date (Testimony of Sydnor). Such evidence provides strong support for the Government's position that Tittjung voluntarily joined the Waffen-SS. However, as this opinion discusses *infra*, the voluntariness of Defendant's service as an armed concentration camp guard is legally irrelevant; all such guards are deemed to have procured their visas illegally. *Fedorenko v. United States*, 449 U.S. 490, 510-11, 514, 66 L. Ed. 2d 686, 101 S. Ct. 737 (1981).

[3]The English translation of "Totenkopf-Sturmbann" is "Death's Head Battalion."

Raming (Testimony of Sydnor; Exh. 14). The roster specifically lists the names, dates of birth, and next-of-kin addresses for the guards at Mauthausen and its subcamps. Entry 100 of the roster bears the following information: the name "Anton Tittjung," the rank "lance corporal," the date of birth "17 November 1924," and the address "Parents: in Erdud, Croatia." This guard roster was seized at Mauthausen on May 6, 1945, by Major Eugene Cohen of the U.S. Army during his official investigation of war crimes committed at Mauthausen and its subcamps (Testimony of Sydnor; Exh. 15). This roster, as well as other similar rosters, are contained in the report of Major Cohen's investigation ("Cohen Report"), portions of which subsequently were admitted into evidence at Nurnberg as Exhibit USA 249 (Testimony of Sydnor; Exh. 15). In the unrebutted opinion of Dr. Charles Sydnor, Jr., a respected historian who has written extensively on the history of Nazi concentration camps, the roster is authentic and lists only guards at the Gross Raming subcamp.

C. *The Nature of Guard Service at Mauthausen and Gross Raming.*

The Totenkopf-Sturmbann was a distinct organization within the Waffen-SS which was responsible for the operation of the Mauthausen camp complex, including its subcamp at Gross Raming, which were concentration camps established and operated by Nazi Germany in Nazi-occupied Austria (Testimony of Sydnor; Exhs. 14 & 15). All guards of prisoners in the Mauthausen concentration camp system were members of the Totenkopf-Sturmbann (Testimony of Sydnor; Exh. 15).

Guards at concentration camps such as Mauthausen and Gross Raming performed various duties, including guarding prisoners to ensure that they performed forced labor and that they did not escape from the labor site; guarding prisoners on forced marches from the main camp to subcamps; and guarding prisoners from the camp perimeter and its watchtowers to ensure that they did not escape (Testimony of Sydnor; Testimony of Zivadin Ljubisavljevic, a former prisoner at Mauthausen and Gross Raming). The guards were armed with rifles or submachine guns while performing their guard duty, and they were under orders to shoot at any prisoner attempting to escape (Testimony of Sydnor; Exhs. 54 & 55).

While performing such guard duties, members of the Totenkopf-Sturmbann ordered, incited, assisted, and generally participated in the persecution of prisoners because of their race, religion, national origin, or political opinion (Testimony of Sydnor). This persecution included, but was not limited to forcible confinement, slave labor, deprivation, physical and emotional abuse, torture, and exterminations (Testimony of Sydnor and Ljubisavljevic).

During the period from 1943 to 1945, persons were imprisoned at the Mauthausen camp complex because of their race, religion, national origin, or political opinion, and from approximately January 1943 until August 1944, persons were imprisoned at the Gross Raming subcamp for the same reasons (Testimony of Sydnor). Among the prisoners incarcerated at Mauthausen and Gross Raming were: Jews; Russian, British, and American prisoners of war; and political opponents of the Nazis, including citizens of Yugoslavia, Poland, the Soviet Union, Spain and many other European

countries (*Id.*). Some prisoners at Mauthausen and its subcamps wore symbols corresponding to the racial, religious, or national origin reasons for their imprisonment, in addition to symbols corresponding to their country of origin (Testimony of Sydnor and Ljubisavljevic). Mauthausen and Gross Raming were concentration camps, the operation of which was entrusted exclusively to the Totenkopf-Sturmbann Company to which Tittjung belonged.

During the period of Tittjung's service, the death toll at Mauthausen ranged from 200 to 300 per day in 1943, and from 350 to 400 per day in 1944 (Testimony of Sydnor). In all, thousands of prisoners died in Mauthausen as the result of shooting, gassing, hanging, electrocution, starvation, forced labor, lethal injection, and other forms of killing (*Id.*). At Gross Raming alone, at least 185 prisoners were killed during the period of Tittjung's service (*Id.*).

D. *Defendant Tittjung's Efforts to Obtain Admission to and Residence in the United States.*

Following World War II, Tittjung resided in Austria for several years. Then, Tittjung applied for entry as a permanent resident pursuant to the Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 87-774, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950). The purpose of the DPA was to enable European refugees driven from their homelands by the war to immigrate to the United States without regard to traditional immigration quotas. *Fedorenko v. United States,* 449 U.S. 490, 495 (1981). The Act specifically excluded from the category of "displaced persons" individuals who had "assisted the enemy in persecuting

civilians." *Id.*; § 2(b), 62 Stat. 1009. The DPA also established an elaborate system of interviews for determining eligibility for displaced person status. At no point in this interview process did Tittjung disclose to United States officials that he had served as a concentration camp guard or been a member of the Totenkopf-Sturmbann.

First, on February 6, 1952, during the course of his visa application, Tittjung completed, signed, and swore to a mandatory "Fragebogen" or questionnaire in which he omitted any reference to his service in the Totenkopf-Sturmbann (Exh. 10 at 17). In describing his military service, Tittjung reported only that he had been a member of the Prinz Eugen Division of the Waffen-SS between 1942 and 1945.[4] By disclosing only his membership in the Prinz Eugen Division, Tittjung either wilfully or inadvertently concealed both his disqualifying membership in the Totenkopf-Sturmbann as well as his service as a concentration camp guard, each of which were grounds for immigration ineligibility.

Next, on March 25, 1952, Tittjung sought a determination from the United States Displaced Persons Commission ("DPC") that he was a "displaced person" as defined in the DPA and therefore eligible to immigrate to the United States. In seeking this determination, Tittjung represented to the U.S. Army Counter Intelligence Corps ("CIC") that he became a member of the Waffen-SS Prinz

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[4]At the time of the completion of the defendant's Fragebogen, rank and file members of the Prinz Eugen Division were deemed eligible for entry into the United States.

Eugen Division in 1942, received four months infantry and artillery training, fought against the Tito partisans in Yugoslavia between February 1943 and Fall 1944, and then retreated to the Austria-Yugoslavia border, arriving there in May 1945 (Exh. 10 at 4). Again, Tittjung did not disclose his service in the Totenkopf-Sturmbann at Gross Raming. In considering Tittjung's status as a displaced person, the DPC noted the CIC's screening report which concluded that "nothing therein . . . warrants applicant's exclusion from the United States." (Exh. 1 at 5). Relying in part on the CIC report, the DPC certified Tittjung as a displaced person on April 9, 1952 (Exh. 1 at 4-6).

On April 10, 1952, Tittjung again omitted these facts in swearing to his permanent residence visa application at Salzburg, Austria (Exh. 1 at 35). On the visa application, Tittjung responded to questions about his date and place of birth and his places of previous residence by reporting only that he was born on November 17, 1924, at Erdud, Yugoslavia, and that his place of residence from 1942-1945 had been the "German Army" (*Id.*). Tittjung did not disclose any more particular information regarding his membership in the Totenkopf-Sturmbann, his residence at Gross Raming, or the nature of his military duties at Gross Raming (*See Id.*).

On April 16, 1952, Tittjung executed an Affidavit as to Subversive Organizations and Movements (Form I-144), in which he swore under oath that he had "never . . . assisted in the persecution of any person because of race, religion, or national origin." (Exh. 1 at 29-30). Tittjung again omitted reference to his guard service, but it is unclear whether any government agent ever informed Tittjung that his service as an armed camp guard prevented him from taking this oath.

Finally, on August 19, 1955, upon reentering the United States as a nonquota immigrant under the Immigration and Nationality Act after a trip to Europe with an expired reentry permit, Tittjung swore to another visa application, on which he described his place of residence from 1942 to 1945 only as "German soldier in Yugoslavia."

Thus, Tittjung failed to disclose his guard service and membership in the Totenkopf-Sturmbann on each occasion when he sought permanent residence in the United States.

E. *Defendant Tittjung's Efforts to Obtain United States Citizenship.*

On November 2, 1973, Tittjung filed with the Immigration and Naturalization Service ("INS") an "Application to File Petition for Naturalization" and a "Statement of Facts for Preparation of Petition," which together comprised INS Form N-400 (Exh. 1 at 12 *et seq.*). Tittjung responded to Question 7 on Form N-400, which asked the applicant to list every "organization, association, . . . or similar group, and [his] foreign military service," by listing only the "German Army" (*Id.*). Thus, Tittjung never informed any United States official of his service as an armed guard at Gross Raming during the naturalization process. It has not been established, however, that Tittjung was asked directly during the naturalization process about whether he had performed concentration camp guard service.

On November 28, 1973, Tittjung filed with this court his petition for naturalization. On January 9, 1974, this court granted Tittjung's Petition for Naturalization and issued to him Certificate of Naturalization No. 9785345.

IV. ARGUMENTS OF THE PARTIES

The Government claims that Tittjung served as an armed guard in a Nazi concentration camp and later misrepresented and concealed this service (1) when applying for a visa to enter the United States under the DPA, (2) when applying for a visa to reenter the United States under the Immigration and Nationality Act of 1952, and (3) when applying for naturalization. The complaint alleges that Tittjung should be denaturalized because of (1) his service in the Mauthausen system, (2) his subsequent misrepresentation and concealment of that service, and (3) his repeated false testimony for the purpose of gaining naturalization.

The Government has sought to establish Tittjung's concentration camp service on the basis of the Gross Raming guard roster and upon the drawing of adverse inferences based upon Tittjung's failure to offer any rebuttal testimony.

Tittjung responds that the Government has failed to establish sufficiently that he served as a concentration camp guard. Specifically, Tittjung argues that the Government has (1) not sufficiently authenticated the concentration camp guard roster bearing defendant's name, (2) offered no eyewitness testimony to establish that Tittjung served as an armed guard, and (3) not met its burden of proof in relying upon opinion testimony regarding the nature of guard service at the Mauthausen and Gross Raming camps.

V. ANALYSIS

A. *Standard of Determination*

In this denaturalization action, the Government bears a heavy burden. It must prove its case by clear, unequivocal, and convincing evidence. *Schneiderman v. United States,* 320 U.S. 118, 125 (1943); *Fedorenko v. United States,* 449 U.S. 490, 505-506 (1981).

B. *Defendant Tittjung's Eligibility for a Visa Under the DPA*

This court finds, based upon documentary and supporting testimonial evidence, that Tittjung did serve as a guard at the Mauthausen concentration camp complex, and was therefore ineligible for a visa under the DPA. Tittjung has not contradicted the Government's evidence of his guard service, nor has he challenged the Government's argument that armed concentration camp guards were ineligible for visas.

1. *The Evidence Convincingly Establishes Tittjung's Guard Service.*

The Gross Raming guard roster bearing Tittjung's name clearly and convincingly establishes that Tittjung did in fact serve as an armed concentration camp guard. This court finds that the roster list refers to the defendant Tittjung and is reliable for several reasons. First, the "Anton Tittjung" entry on the roster bears the same date of birth and hometown that Tittjung listed on his visa application and on other documents (Exhs. 1, 10, & 14). Second, in the opinion of an expert

historian familiar with concentration camp documents, the roster appears similar in content and style to other rosters then in use in the Mauthausen camp system (Testimony of Sydnor; Exhs. 14 & 15). Third, the markings at the bottom of the roster (noting that an entry number had been repeated) reveal that the roster was proofread for accuracy before being signed by the SS company commander on July 27, 1944 (Testimony of Sydnor; Exh. 14). Fourth, the fact that the "Cohen Report" notes that correction at the bottom of the roster establishes that the roster was seized at Mauthausen by U.S. Army investigators in early May 1945 (Exhs. 14 & 15). Finally, extrinsic documents, including U.S. military trial records and statements as well as the Mauthausen records of prisoner deaths, corroborate that as many as ten of the other guards named on the roster were in fact stationed as guards at Gross Raming around the date indicated on the roster (Testimony of Sydnor; Exhs. 14, & 73-77). Hence, the Gross Raming guard roster is authentic and convincingly establishes that Tittjung was a concentration camp guard.

2. *Defendant Tittjung's Ineligibility for Visa and Citizenship*

A certificate of naturalization must be revoked if it was illegally procured. 8 U.S.C. § 1451(a); *Fedorenko v. United States*, 449 U.S. 490, 515 (1981). Naturalization is illegally procured if a naturalized citizen has failed to comply with the statutory prerequisites for naturalization. 449 U.S. at 515. Lawful admission into this country with a valid immigration visa, is a statutory requirement for naturalization. *See* 8 U.S.C. § 1427(a)(1). The amended DPA, however, "made all those who assisted in the persecution ineligible for

visas." 449 U.S. at 512 (footnote omitted).[5] Therefore, the Supreme Court established in *Fedorenko* that all concentration camp guards were ineligible as a matter of law for visas because they had assisted in the type of persecution proscribed by the DPA. 449 U.S. at 513-16.

In *Fedorenko*, the facts before the Court established that Fedorenko had served as a perimeter guard at the Treblinka concentration camp, but did not establish any specific actions committed by Fedorenko against prisoners. The Court held that an "individual's service as a concentration camp armed guard -- whether voluntary or involuntary -- made him ineligible for a visa." 449 U.S. at 512. In reaching this decision, the Court found that there was "no room for doubt that if petitioner had disclosed the fact that he had been an armed guard at Treblinka, he would have been found ineligible for a visa under the DPA." *Id.* at 513.

This court is bound to reach the same conclusion that the Supreme Court reached in *Fedorenko*. Prisoners were persecuted and killed because of race, religion, or national origin at Gross Raming (Testimony of Sydnor), as at Treblinka. *See Fedorenko v. United States,* 449 U.S. at 512-13 n. 34. In addition, guards at Gross Raming were issued uniforms, armed with guns, and paid a stipend (Testimony of Sydnor), as were guards at Treblinka. *See Fedorenko v. United States,* 449 U.S. at 512-13 n. 34. Hence, like *Fedorenko*, this case does not involve "difficult line-drawing

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[5]In 1950, Congress amended Section 13 of the DPA so as to deny explicitly displaced person status, and thus visa eligibility, to applicants who had assisted Nazi Germany in persecuting civil populations of countries. 64 Stat. 219, 227 (June 16, 1951).

problems" regarding the nature of Tittjung's wartime service. *Id.* Moreover, the testimony of officials who processed Tittjung's visa application under the DPA establish unequivocally that if Tittjung had in fact disclosed that he had been a guard at Gross Raming, he would not have been granted a visa under the DPA (Testimony of Schneider, Ziemack, Bishop, and Gerstl).

This court finds that Tittjung was an armed guard at a Nazi concentration camp, and therefore concludes that he failed to obtain a valid visa, which is a statutory prerequisite to naturalization. 8 U.S.C. § 1427(a); *Fedorenko,* 449 U.S. at 514-15; *United States v. Kairys,* 782 F.2d 1374, 1377 n. 3 (7th Cir. 1989), *cert. denied*, 476 U.S. 1153 (1986). Consequently, Tittjung's subsequent naturalization was illegally procured. *Fedorenko,* 449 U.S. at 512-15; *Kairys,* 782 F.2d at 1377 n. 3. This conclusion is not affected by the voluntariness of Tittjung's service, 449 U.S. at 512-13, or the lack of eyewitness testimony showing Tittjung's individual involvement in persecution, 449 U.S. at 510 n. 32, 512, 513.

This court has found that Tittjung was ineligible for a visa as a matter of law. Therefore, it need not address the Government's additional claims based upon Tittjung's alleged misrepresentations in procuring his visa and in obtaining naturalization.

IT IS THEREFORE ORDERED that the United States citizenship of Anton Tittjung is REVOKED;

IT IS FURTHER ORDERED that the January 9, 1974 order of this court admitting Anton Tittjung to citizenship is SET ASIDE;

IT IS FURTHER ORDERED that Anton Tittjung's Certificate of Naturalization, No. 9785345, is CANCELLED.

Dated at Milwaukee, Wisconsin, this 14th day of December, 1990.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

[Filed February 23, 2001]

No. 00-2442

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
ANTON TITTJUNG,)
Defendant-Appellant.)

Before Hon. JOEL M. FLAUM, Chief Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 89-C-1068
John W. Reynolds, Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on February 8, 2001, by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

8 U.S.C. §1101(a)(20) and 8 C.F.R., Part I, §1.1(p)

8 U.S.C. §1101. Definitions

(a)(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

8 C.F.R., Part I, §1.1(p) - Definitions

§1.1 Definitions.

As used in this chapter:

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.

APPENDIX F

CERTIFICATE OF NATURALIZATION OF ANTON TITTJUNG

[Fold-out]

THE UNITED STATES OF AMERICA

TO BE FORWARDED TO
IMMIGRATION AND NATURALIZATION SERVICE

CERTIFICATE OF NATURALIZATION

No. 9785345

Petition No. 46586

Alien Registration No. A8 315 083

·DUPLICATE·

Personal description of holder as of date of naturalization: Date of birth November 17, 1924; sex Male; complexion Medium; color of eyes Brown; color of hair Brown; height 5 feet 4 inches; weight 145 pounds; visible distinctive marks None; Marital status Married; Country of former nationality Germany

I certify that the description above given is true, and that the photograph affixed hereto is a likeness of me.

Anton Tittling
(Complete and true signature of holder)

Seal

UNITED STATES OF AMERICA
EASTERN DISTRICT OF WISCONSIN } ss:

Be it known that at a term of the United States District Court of Eastern District of Wisconsin held pursuant to law at Milwaukee, Wisconsin on January 9, 1974 the Court having found that

ANTON TITTLING

then residing at 4159 South 66th Street, Greenfield, Wisconsin, in lands to reside permanently in the United States (when so required by the Naturalization Laws of the United States), had in all other respects complied with the applicable provisions of such naturalization laws, and was entitled to be admitted to citizenship thereupon ordered that such person be and he was admitted as a citizen of the United States of America.

In testimony whereof the seal of the court is hereunto affixed this 9th day of January in the year of our Lord nineteen hundred and seventy-four.

RUTH W. LA FAVE
Clerk of the U. S. District Court.
By Ellen Howard Deputy Clerk.

IT IS PUNISHABLE BY U. S. LAW TO COPY,
PRINT OR PHOTOGRAPH THIS CERTIFICATE.

DEPARTMENT OF JUSTICE

BEST AVAILABLE COPY